

Central Intelligence Agency



Washington, D. C. 20505

Executive Registry

84-8093

10 September 1984

The Honorable Joseph Wright
Deputy Director
Office of Management and Budget
Washington, D. C. 20503

Dear Joe,

Here is a copy of my letter to the Attorney General on the high national interest in having the CIA operational files exempted from the Freedom of Information Act (FOIA).

I strongly believe that the continuing use of the Privacy Act as an FOIA exemption in law enforcement is of far lesser significance than the impact that exemption of CIA's operational files in relieving liaison services and agents all over the world from the worry that helping the United States can lead to the loss of sources and risk of lives and reputations would have.

I am told that the important law enforcement interest can be met by asserting the exemptions already provided in the FOIA.

I also understand that if the Supreme Court approves the continued use of the Privacy Act as an FOIA exemption, Congress is almost sure to enact legislation to take it away.

Thus, we risk a major achievement for the Administration in obtaining the relief from the FOIA it has set as one of its goals in order to save a doubtful exemption, which is of little added value and which is not likely to last very long in any event.

[Redacted] I believe that you will find the use of the Privacy Act as an exemption has not been either frequent or significant.

The attached clipping from the New York Times confirms our view that if we are going to get this achieved it will have to be done during this next week or two.

Sincerely,

William J. Casey
Director of Central Intelligence

Attachments

OLL 84-2934

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OGC, CDO/OGC. FR File

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Central Intelligence Agency



Washington, D. C. 20505

OLL 84-2934

6 September 1984

The Honorable William French Smith
The Attorney General
Washington, D. C. 20530

Dear Bill:

I write you on a matter on which our staffs are working and which is of high importance to our security interests. I bring it to your attention now because time is short and we may need to go over it together.

As you know, we have been trying for the last six years to obtain legislative relief from the unique burdens we face under the Freedom of Information Act (FOIA). We now are on the verge of obtaining this essential relief.

The pending legislation would bring major benefits to our national intelligence effort. It would remove from the search and review provisions of the FOIA large segments of our operational files, thereby allowing the CIA to provide greater assurances of confidentiality to our foreign sources and liaison services and releasing many of our most experienced officials from involvement in FOIA processing. It would also enhance the maintenance of compartmentation of CIA information, which is a principle crucial to the success of sensitive intelligence operations. The Administration, including the Department of Justice, has extensively examined and approved the proposal that CIA seek separate legislation for FOIA relief and the President has personally given his support.

Our legislation was unanimously passed by the Senate late last year. The House Permanent Select Committee on Intelligence amended the bill and unanimously reported it earlier this year. Representative Glenn English, Chairman of the House Government Operations Subcommittee on Government Information, Justice and Agriculture, then made the addition of an amendment to the Privacy Act a prerequisite for Subcommittee action on the legislation. This amendment simply states that the Privacy Act cannot be used as a withholding statute under exemption (b)(3) of the FOIA.


We understand that it is a matter of some concern to the Department of Justice because it would be contrary to the revised policy guidance given by the Department of Justice on the use of the Privacy Act as a (b)(3) exemption and because this very question is awaiting decision by the United States Supreme Court. On the other hand, we have been informed that the Department of Justice will withdraw its objections to Representative English's amendment to our bill if a satisfactory agreement can be reached on a substitute bill for S. 774, the government-wide FOIA relief bill. I understand that negotiations are currently under way to achieve this compromise.

The Administration may have to evaluate the prospects and the relative value of getting CIA's sensitive operational files exempted against preserving Justice's ability to use the Privacy Act to exempt some files from demands under the Freedom of Information Act. The considerations from the CIA standpoint are:

- a. Our operational files will no longer need to be searched.
- b. Our foreign sources and liaison services would have greater assurance that we can preserve their confidentiality.
- c. Some of our most able and experienced officers could turn from FOIA processing to gathering intelligence. The Agency can use only high caliber personnel to protect sources included in its operational files.
- d. While the relief pertains only to the CIA records at this time, it certainly is a blueprint for other agencies in the Intelligence Community to obtain similar relief in the near future.
- e. It is extremely important for the Agency and its personnel to continue the momentum on the legislative front which started with the passage of the Classified Information Procedures Act in 1982 by obtaining this legislation as opposed to allowing this hard fought effort to go down the drain without any appreciable results.

Bill, this is a critical issue for this Agency. We urgently need this relief from the FOIA. It would represent an auspicious start in achieving a goal to which this Administration has been committed since its inception. If we do not get enactment of this legislation in this Congress, the chances of its enactment over the next several years are slim. As a result of the successful adoption of Executive Orders 12333 and 12356 and passage of the Intelligence Identities Protection Act of 1982, this Administration has built up a positive regulatory and legislative momentum in the national security arena which would be severely impacted if we failed to obtain enactment of the FOIA legislation in this Congress. I believe with time running out in this session of the Congress it is essential we resolve this quickly.

Sincerely,



William J. Casey
Director of Central Intelligence

ARTICLE APPEARED
ON PAGE A-24

NEW YORK TIMES
9 September 1984

A.C.L.U. Reviews Support of Information Bill

By DAVID BURNHAM

Special to The New York Times

WASHINGTON — The American Civil Liberties Union is reviewing its support for legislation that would exempt most of the operational files of the Central Intelligence Agency from requests under the Freedom of Information Act.

Norman Dorsen, president of the civil liberties group, said the decision to study the bill further was reached after a lawyer representing the southern California affiliate of the organization detailed his opposition at an Aug. 18 meeting of the union's executive committee. The meeting followed a

vote by the California affiliate several months ago to oppose the national group's position on the issue.

The intelligence agency and the liberties union have both testified in support of the House version of the bill, and this harmony has played a major role in the bill's progress through Congress.

The California affiliate's objections center on provisions in the bill that it contends would almost eliminate the right of Federal judges to review administrative decisions of the C.I.A.

A second criticism is the belief that if the proposal wins Congressional approval, a number of other intelligence and law-enforcement agencies would request the same kind of exemption from the information act, a law establishing the general principle that the public has the right to read almost all Government documents.

Ira Glasser, executive director of the national A.C.L.U., said he had asked lawyers in and outside his group who specialize in cases of freedom of information to assess these objections. "I'm trying to do a serious review of their claim," he said. "This is a process that is quite normal."

Mr. Glasser said the review would involve the three lawyers who act as the A.C.L.U.'s general counsel.

Mark Lynch, an expert for the civil liberties group on the freedom of information law, characterized the review as a preliminary inquiry. He said the group would reconsider its stance on the bill only if the criticism was found to be merited.

"It is unlikely there can be any criticism that has not been considered," he said.

The legislation exempting the intelligence agency from some provisions of the information act has been approved by the House Intelligence Committee and the House Government Operations Committee. It may come to the floor soon under a procedure that requires approval of two-thirds of the members to pass. The Senate already has passed its version of the bill.

Under current law, the intelligence

agency is required to search all of its files when it gets a request under the Freedom of Information Act. The agency is then permitted to delete certain kinds of classified information. Under the House proposal, the agency would be excused from searching several specific files from which information is rarely, if ever, released.

Supporters of the legislation contend that by exempting the C.I.A. from making what are usually fruitless searches, long delays in answering other requests would be reduced. Critics, however, argue that if the legislation becomes law, the intelligence agency would avoid disclosure of more and more information by placing it in exempted files.

Mr. Glasser said that if the questions raised by Melv Westreich, an Orange County lawyer representing the organization's southern California affiliate, were found to be valid, he would withdraw the union's backing.

"If everyone convinces me that we were all wet in our first position, that's the end of it," he said in an interview.

Mr. Glasser said the general counsel, Frank Askin, a law professor at Rutgers University; Lawrence Herman, a law professor at Ohio State, and Harriet Pilpel, a lawyer in private practice in New York City, were trying to complete their review quickly.

The legislation has not attracted wide criticism. Among those who opposed it, however, were Jack Landau of the Reporters Committee for the Freedom of the Press and Samuel R. Gammmon, a former ambassador who spoke for the American Historical Association.

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H.R. 5164,
The "Central Intelligence Agency Information Act"

- ° Last year S. 1324, the Central Intelligence Agency Information Act, was introduced by Senator Strom Thurmond and Chairman Goldwater. The bill provides urgently needed relief from the unique burdens we face under the Freedom of Information Act (FOIA).
- ° The legislation would bring major benefits to our national intelligence effort. It would remove from the search and review provisions of the FOIA large segments of our operational files, thereby allowing the CIA to provide greater assurances of confidentiality to our foreign sources and liaison services and releasing many of our most experienced officials from involvement in FOIA processing. It would also enhance the maintenance of compartmentation of CIA information, which is a principle crucial to the success of sensitive intelligence operations.
- ° We had examined the possibility of stretching this relief to the entire Intelligence Community but this effort was abandoned when it was found that the file systems of the other Intelligence Community agencies do not lend themselves to the file designation approach used in this legislation. In addition, the concerns of the other agencies with the FOIA is not as great as ours. The decision was then made by the NSC and OMB to seek relief only for CIA in this Congress.
- ° As you know, S. 1324 was unanimously passed by the Senate late last year. The House Permanent Select Committee on Intelligence amended the legislation and unanimously reported out a clean bill, H.R. 5164, earlier this year. The amendments are acceptable to us and to the SSCI.
- ° House Government Operations Committee, in order to end a serious disagreement between the Committee and the Department of Justice (DOJ), made the addition of an amendment to the Privacy Act (the so-called (b)(3) amendment) a prerequisite for Committee action on the legislation. HPSCI agreed to accept the addition of the (b)(3) amendment in return for House action and passage of the legislation.

Background on the (b)(3) Amendment

- ° The (b)(3) provision amends the Privacy Act to state that the Privacy Act cannot be used as a basis upon which to withhold information under exemption (b)(3) of the FOIA. Exemption (b)(3) of the FOIA allows the withholding of information "specifically exempted from disclosure by statute".
- ° From 1975 to 1984, Department of Justice (DOJ) regulations and official Office of Management and Budget (OMB) guidance stated that the Privacy Act could not be used to withhold information from a FOIA requester under exemption (b)(3).
- ° As a result of two Circuit Court of Appeals decisions, sua sponte, that the Privacy Act could be used as a (b)(3) exemption statute, the DOJ in 1981 reversed its litigating position on the issue and, subsequently, in March 1984 OMB guidances and DOJ regulations were reversed as well.
- ° The Federal circuits are now split on the question of whether the Privacy Act qualifies as a (b)(3) exemption statute and the United States Supreme Court has accepted certiorari in two cases with conflicting decisions.
- ° The reversal of OMB guidance and DOJ regulations greatly angered Representatives from both sides of the aisle and this led to the addition of the amendment to the CIA FOIA bill in the House Government Operations Committee.
- ° CIA does not oppose the (b)(3) amendment since it would not impact upon our processing of FOIA requests.
- ° The practical benefits which would be achieved by enactment of the CIA FOIA bill are important to the accomplishment of our intelligence mission. Continued opposition to the (b)(3) amendment would only provide minimal and temporary relief to the FBI in the processing of their FOIA requests. I have had an unofficial conversation with FBI Director Webster who confirms that the impact of resisting this amendment would be minimal. In fact, it is used only rarely by

the FBI despite the change in policy by DOJ. The FBI does not rely upon use of the Privacy Act as a (b)(3) exemption statute in their administrative processing of FOIA requests but only presses this position in litigation brought in the District of Columbia. Even if the FBI were to operate pursuant to the changed policy, it would have no substantive effect on the amount of information released by the FBI but might cut down on their workload. The advantage to the Government of continued resistance to the (b)(3) amendment pales in comparison to the substantive relief CIA would achieve from no longer having to search and review information in our operational files. DOJ opposes our bill with the (b)(3) amendment mainly because it would be contrary to their revised regulations and would serve to moot two cases pending before the Supreme Court on the issue.

- ° The issue then is whether continued opposition to the (b)(3) amendment is worth the price of losing the CIA FOIA bill.
- ° In any event, DOJ's victory would not be long-lived because: (a) if the Supreme Court rules against the DOJ position, the CIA bill will have been lost for naught; and (b) if they rule in favor of the DOJ position, this amendment will be introduced and pushed hard in the next Congress. The amendment has strong bipartisan support in the House and would likely pass in the next Congress.
- ° Passage of the CIA bill in the next Congress is very doubtful as the ACLU national office, which has given crucial support to the bill during this Congress, is under great pressure to withdraw its support for the bill. In this connection, note the 9 September New York Times article (attached).
- ° The suggestion has been made that after passage by the House, the Senate take action to strip the CIA bill of the (b)(3) amendment. This would end any realistic chance of enactment in this Congress because of: (1) the strongly held views of members of the House Government Operations Committee (particularly Representatives Erlenborn, Kindness and Horton); and (2) the bipartisan acceptance of the (b)(3) amendment as a prerequisite to House action on the legislation by members of the House Permanent Select Committee on Intelligence.

- ° Stoppage of the (b)(3) amendment in this Congress also seriously jeopardizes any chance of House Government Operations Committee action on the government-wide FOIA relief bill (S. 774) in this Congress or the next.
- ° On the other hand, concession by DOJ to the (b)(3) amendment at this point in time can be used to attain agreement on substantial portions of S. 774. DOJ has stated that they would recede from their opposition to our bill if a satisfactory agreement can be reached concerning S. 774.
- ° Negotiations between House Government Operations and DOJ are currently under way on a substitute bill for S. 774.